In the Supreme Court of the United States

OCTOBER TERM, 1922.

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MARTIN KIRKENDALL,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Erie Railroad Company, respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals of the 8th Judicial District of the State of Ohio.

Your petitioner says that this action was brought in the Municipal Court of Cleveland, Ohio, to recover the claimed value of a shipment of household furniture which was lost in transit.

Trial resulted in a verdict against the Railroad Company, and after overruling its duly filed Motion for a new trial, the trial court entered judgment on the verdict against the Erie Railroad Company.

Thereafter, your petitioner prosecuted error to the judgment of the trial court in the Court of Appeals for the 8th Judicial District of the State of Ohio, sitting within and for Cuyahoga County in said State, which Court, on the 1st day of December, 1922, affirmed the judgment of the trial court.

Thereafter, on the 29th day of January, 1923, your petitioner filed in the Supreme Court of the State of Ohio a Motion for an order directing said Court of Appeals to certify its record to said Supreme Court for review, and said court, on the 20th day of March, 1923, entered an order overruling the said Motion, and thereupon the judgment of said Court of Appeals became the final judgment of the highest state court in which a judgment in said cause could be had.

Your petitioner says that in said cause a title, right or immunity was claimed by the petitioner under statutes of the United States, as will hereinafter appear, and the decision of said court was against said right, title or immunity.

The facts of the case are as follows:

STATEMENT OF THE CASE.

On September 18, 1920, at Corning, New York, respondent delivered to petitioner a shipment described in the bill of lading as "one box of bedding, one barrel and one box," for transportation to Cleveland, Ohio. The article described as "one box of bedding" was never delivered. It is admitted that the box in question contained household furniture rather than bedding.

As will hereafter more fully appear, the tariff and classifications under which the shipment moved, provided for a limitation of liability for the loss of a shipment of household furniture, whereas, no limitation of liability was provided as to shipments of bedding. Respondent claims as damages the full value of the household furniture. Petitioner claims the right to limit its liability.

The Interstate Commerce Commission, on November 13, 1919, in a proceeding wherein the Director General of Railroads, operating the petitioner's lines of railroad, was a party, made an order authorizing the maintenance of rates, upon shipments of household furniture, dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property. The basic rate established was upon a declared valuation of 10¢ or less per lb., the rates progressively increasing with increased valuation.

Said order of said Commission stipulated among other things:

> "The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

'I hereby declare the value of each article of Household Goods herein described as .... cents per pound.'

.....

Shipper's signature.

or

'The value of each article of Household Goods herein described is hereby agreed upon as ..... cents per pound.'

.....

Shipper's signature.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted."

At the time of the shipment the respondent did not state the value of the property nor did the petitioner inquire as to the value. The respondent claims that he told the agent receiving the shipment for the petitioner that the box contained household furniture, but that nevertheless the agent described the shipment in the bill of lading as bedding. The charges paid were the basic rate established upon a declared value of not exceeding 10¢ per pound. This rate was what was known as the "first class" rate and was the same rate as that applying to a shipment of bedding. The respondent alleged damages in the sum of Four Hundred Fifty Dollars ($450.00). Petitioner answered admitting liability for Twenty Eight Dollars ($28.00), under the terms of the tariff. The trial court gave judgment for Three Hundred Eighty Six and 90/100 Dollars ($386.90), representing the full value of the furniture, which judgment the Court of Appeals for the 8th Judicial District of Ohio affirmed.

QUESTION OF LAW TO BE REVIEWED.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The Amendment makes the carrier liable for the full amount of loss, damage, or injury to any property which it has received for transportation, notwithstanding any limitation of liability of the amount of recovery, or representation or agreement as to value—

> "provided, however, that the provisions hereof * * * shall not apply * * *. Second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * *."

The Court charged the jury as follows, to which your petitioner duly excepted:

> "Now, if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package contained, and it was lost or failure to deliver it, *(sic)* then I say to you you should find for this plaintiff."

"Now as to the issue in this case, the first is to determine how and under what conditions were those goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge."

"In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be * * *"

This view of the law was also taken by the Court of Appeals. It thus appears that the judgments of the State courts are made to rest upon the ground that the acceptance and billing of the shipment as bedding, by the agent of the petitioner, when he knew that it was household furniture, preclude the petitioner from limiting its liability.

Your petitioner contends that since this shipment was in fact household furniture, its transportation by petitioner is controlled by the orders, tariffs and classifications applicable to household furniture, and the fact that the agent described the shipment as bedding, even though he did so with full knowledge, is immaterial. Your petitioner further contends that the tariff applicable to shipments of household furniture limited petitioner's liability in this case to 10c per pound, which is the limitation of liability attaching to the rate under which the shipment moved, which rate the respondent paid, and that your petitioner's right to so limit its liability is derived from said Cummins Amendment, and is a right, title, privilege or immunity under said Statute.

Your petitioner therefore represents that said Court of Appeals has rendered a decision against said right,

title, privilege or immunity claimed by your petitioner under such statute; that such decision is erroneous; that the same ought to be corrected.

And your petitioner files herewith, as an exhibit hereto, as required by the rules of this Court, a duly certified transcript of the record and proceedings of the Municipal Court of Cleveland, Ohio; of the Court of Appeals of the 8th Judicial District of the State of Ohio and of the Supreme Court of Ohio in the said case hereinbefore mentioned.

WHEREFORE, your petitioner prays that a writ of certiorari may issue to said Court of Appeals requiring said court to certify said cause to this Court for review and determination by it, and that upon the hearing said judgment and decision of said Court of Appeals may be reversed and petitioner may be restored to all things it has lost by reason thereof.

And your petitioner will ever pray.

Respectfully submitted,

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

Erie Railroad Company,
Petitioner,

vs.

Martin Kirkendall,
Respondent.

NOTICE.

Respondent is hereby notified that on Monday, the 21st day of May, 1923, at the opening of the above named Court on that day, or thereafter at the convenience of said Court, the Erie Railroad Company will submit to the Supreme Court of the United States through the Clerk of said court, a petition for Writ of Certiorari and Brief in support thereof, copies of which are herewith delivered to you in compliance with the rules of said court.

Dated at Cleveland, Ohio, April 17, 1923.

Edward A. Foote,
Benjamin D. Holt,
Attorneys for Petitioner.

Due service and receipt of a copy of the foregoing Notice and of the Petition for Writ of Certiorari and Brief in support of said Petition are hereby acknowledged, this 17th day of April, 1923.

Gott, Chamberlain, Bloomfield & Henderson,
Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MARTIN KIRKENDALL,
Respondent.

BRIEF OF PLAINTIFF IN ERROR ON PETITION FOR WRIT OF CERTIORARI.

This was a civil action instituted in the Municipal Court of Cleveland, Ohio, by Martin Kirkendall against the Erie Railroad Company, to recover the claimed value of a shipment of household furniture which was lost in transit.

The case was tried in said Municipal Court and judgment was rendered in favor of the plaintiff therein, which judgment was affirmed by the Court of Appeals of Cuyahoga County. Thereafter the plaintiff in error, the Erie Railroad Company, filed a motion in the Supreme Court of Ohio asking said court to require the Court of Appeals of Cuyahoga County to certify its record to said court, but the Supreme Court of the State of Ohio overruled said motion and refused to require said Court of Appeals to certify its record, and no opinion was rendered by said Supreme Court. Thereupon the judgment of the Court of Appeals became the final judgment of the highest state Court in which a judgment in said cause could be had.

Andrews vs. Virginia Ry. Co., 248 U. S. 272;
Stratton vs. Stratton, 239 U. S. 55.

The facts of the case are in brief as follows:

STATEMENT OF THE CASE.

On September 18, 1920, at Corning, New York, respondent delivered to petitioner a shipment described in the bill of lading as "one box of bedding, one barrel and one box," for transportation to Cleveland, Ohio. The article described as "one box of bedding" was never delivered. It is admitted that the box in question contained household furniture rather than bedding.

As will hereafter more fully appear, the tariff and classifications under which the shipment moved provided for a limitation of liability for the loss of a shipment of household furniture, whereas, no limitation of liability was provided as to shipments of bedding. Respondent claims as damages the full value of the household furniture. Petitioner claims the right to limit its liability.

The Interstate Commerce Commission, on November 13, 1919, in a proceeding wherein the Director General of Railroads, operating the petitioner's lines of railroad, was a party, made an order authorizing the maintenance of rates, upon shipments of household furniture, dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property. The basic rate established was upon a declared valuation of 10¢ or less per lb., the rates progressively increasing with increased valuation.

Said order of said Commission stipulated among other things:

> "The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

'I hereby declare the value of each article of Household Goods herein described as .... cents per pound.'

.....

Shippers Signature.

or

'The value of each article of Household Goods herein described is hereby agreed upon as .. cents per pound.'

.....

Shippers Signature.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted."

At the time of the shipment the respondent did not state the value of the property, nor did the petitioner inquire as to the value. The respondent claims that he told the agent receiving the shipment for the petitioner that the box contained household furniture, but that nevertheless the agent described the shipment in the bill of lading as bedding. This is denied by the agent, who testified that respondent told him the box contained bedding. The charges paid were the basic rate established upon a declared value of not exceeding 10c per pound. This rate was what was known as the "first class" rate and was the same rate as that applying to a shipment of bedding. The respondent claimed damages for the full value of the furniture in the sum of Four Hundred Fifty Dollars ($450.00). Petitioner answered admitting liability for Twenty Eight Dollars ($28.00), under the terms of the tariff. The trial court gave judgment for Three Hundred Eighty Six and 90/100 Dollars ($386.90), representing the full value of the furniture, which judgment the Court of Appeals for the 8th Judicial District of Ohio affirmed.

QUESTION OF LAW TO BE REVIEWED.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The Amendment makes the carrier liable for the full amount of loss, damage, or injury to any property which it has received for transportation, notwithstanding any limitation of liability of the amount of recovery, or representation or agreement as to value—

> "provided, however, that the provisions hereof * * * shall not apply * * *. Second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * *."

The Court charged the jury as follows, to which your petitioner duly excepted:

> "Now if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package contained, and it was lost or failure to deliver it, *(sic)* then I say to you you should find for this plaintiff."
>
> "Now as to the issue in this case, the first is to determine how and under what conditions were those

goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge."

"In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be * * *"

This view of the law was also taken by the Court of Appeals. It thus appears that the judgments of the State courts are made to rest upon the ground that the acceptance and billing of the shipment as bedding, by the agent of the petitioner, when he knew that it was household furniture, preclude the petitioner from limiting its liability.

Your petitioner contends that since this shipment was in fact household furniture, its transportation by petitioner is controlled by the orders, tariffs and classifications applicable to household furniture, and the fact that the agent described the shipment as bedding, even though he did so with full knowledge, is immaterial. Your petitioner further contends that the tariff applicable to shipments of household furniture limited petitioner's liability in this case to 10c per pound, which is the limitation of liability attaching to the rate under which the shipment moved, which rate the respondent paid, and that your petitioner's right to so limit its liability is derived from said Cummins Amendment. This case, therefore, raises a Federal question for the consideration of the Court.

ARGUMENT.

Your petitioner contends that respondent, at the time of the delivery of the shipment to petitioner, was chargeable with knowledge of the provisions of the tariffs and classifications then in effect; that is to say, the respondent was conclusively presumed to know that shipments of household furniture carry rates dependent upon the declared value thereof, and he was presumed to know what those rates were. Therefore, in paying the rate which, as regards household furniture, carried with it a limitation of liability to 10c per pound, based upon a declared value, respondent in law is taken to have made a declaration of value of 10c per pound, and he cannot now be heard to assert a higher valuation. "Having accepted the benefit of a lower rate, dependent upon the specified valuation, respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing." (*American Railway Express Company vs. Lindenburg,* decided by this Court January 8, 1923).

It has been repeatedly laid down by this Court that an agent of a carrier cannot waive the terms of the tariff. The rights and obligations of the shipper and carrier are conclusively determined by the provisions of the filed tariffs. Neither party can depart therefrom by any contract or agreement, nor through any contrary understanding or belief, innocent or otherwise. This is true as to rates, classifications, provisions or concessions of any kind.

American Railway Express Company vs. Lindenburg, decided by the Supreme Court of the United States, January 8, 1923;

Georgia, etc. Railroad vs. Bliss Milling Company, 241 U. S. 190;

Atchison, etc. Railroad vs. Robinson, 233 U. S. 173;

C. & A. R. R. vs. Kirby, 225 U. S. 155.

The claim that the agent knew that the shipment was household furniture but nevertheless described it as bedding in the bill of lading, is immaterial. The knowledge, or lack of knowledge, of either the agent or the shipper concerning either the facts surrounding the shipment, or the terms of the tariff, in no way affects the application of the tariff. This rule has been laid down because making the application of the tariff depend upon the knowledge of either shipper or agent would open the door to abuses and practices which the statutes were intended to prevent, as this Court has repeatedly held.

Respondent, in this case, accepted the bill of lading in which the shipment was described as bedding, when he knew it was household furniture. In so doing he took advantage of a lower rate than he would have paid on a shipment of household furniture if he had declared thereon the value claimed in this action, and respondent, in addition, now claims against the carrier the unlimited liability which attaches to a shipment of bedding. On the plainest principles of fair dealing, this position is untenable, and respondent seeks to justify it on the ground that the agent of petitioner knew of the fraud. We insist that this contention cannot be heard, and that if the judgment below is allowed to stand, then in every case both the shipper and carrier would be permitted to violate the provisions of the tariff by showing that the agent of the carrier had knowledge of such violation.

The trial court charged the jury that plaintiff might recover the full value of the furniture if it found that the agent of the Erie Railroad Company had knowledge of the contents of the box, and this was the view of the Court of Appeals. We insist that this view of the law is manifestly erroneous.

For the reasons urged, therefore, we respectfully submit that the writ of certiorari prayed for should be granted.

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

No. 306.

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MARTIN KIRKENDALL,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT OF OHIO.

EDWARD A. FOOTE,

BENJAMIN D. HOLT,

Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1923.

No. 306.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MARTIN KIRKENDALL,
Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT OF OHIO.

This was a civil action instituted in the Municipal Court of Cleveland, Ohio, by Martin Kirkendall against the Erie Railroad Company, to recover the claimed value of a shipment of household goods which was lost in transit.

The case was tried to a jury in said Municipal Court and judgment on a verdict was rendered in favor of the plaintiff therein, which judgment was affirmed by the Court of Appeals of the 8th Judicial District sitting in and for Cuyahoga County, Ohio. Thereafter the Erie Railroad Company filed a motion in the Supreme Court of Ohio asking said court to require the said Court of Appeals of Cuyahoga County to certify its record to said court, but the Supreme Court of the State of Ohio overruled said motion and refused to require said Court of Appeals to certify its record, and no opinion was rendered by said Supreme Court. There-

upon the judgment of the Court of Appeals became the final judgment of the highest state Court in which a judgment in said cause could be had. The case is here on a writ of certiorari to review that judgment.

STATEMENT OF THE CASE.

The facts of the case are in brief as follows:

On September 18, 1920, at Corning, New York, respondent delivered to petitioner for transportation to Cleveland, Ohio, a shipment described in the bill of lading as

"1 Box Bedding,
1 1 Bbl. canned fruit glass,
1 Box canned fruit."

The article described as "one box bedding" was never delivered to the consignee. It is admitted that the box in question contained household goods rather than bedding.

As will more fully appear, the shipment moved under a tariff which, taken in connection with the Cummins Amendment, provided for a limitation of liability of the carrier for the loss of a shipment of household goods, whereas no limitation of liability was provided as to shipments of bedding. The respondent claimed damages for the full value of the household goods contained in said box in the sum of Four Hundred Fifty Dollars ($450.00). Petitioner answered admitting liability for Twenty Eight Dollars ($28.00), under the terms of the tariff. The trial court gave judgment for Three Hundred Eighty Six and 90/100 Dollars ($386.90), representing the full value of the household goods contained in said box, which judgment the Court of Appeals for the 8th Judicial District of Ohio affirmed.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The Amendment makes the carrier liable for the full amount of loss, damage, or injury to any property which it has received for transportation, notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value—

> "provided, however, that the provisions hereof * * * shall not apply, * * * second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * *."

The Interstate Commerce Commission, on November 13, 1919, in a proceeding wherein the Director General of Railroads, operating the petitioner's lines of railroad, was a party, made an order authorizing the maintenance of rates, upon shipments of household goods, dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property. The basic rate established was upon a declared valuation of 10c or less per lb., the rates progressively increasing with increased valuation. (P. 22-23 Record).

Said order of said Commission stipulated among other things:

"The value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as the case may be, must be entered on Shipping Order and Bill of Lading as follows:

'I hereby declare the value of each article of Household Goods herein described as .... cents per pound.'

.....

Shippers Signature.

or

'The value of each article of Household Goods herein described is hereby agreed upon as .... cents per pound.'

.....

Shippers Signature.

If consignor declines to declare value or agree to released value in writing, the shipment will not be accepted." (P. 23-24 Record).

At the time of the shipment the respondent did not state the value of the property, nor did the petitioner inquire as to its value. Respondent claims that he told the agent of the petitioner who received the shipment that the box contained household goods, but that nevertheless this agent described the shipment in the bill of lading as bedding. This is denied by the agent, who testified that respondent told him the box contained bedding. (P. 19 Record)

Because of this misdescription the agent did not inquire as to the value of the property, there being but one rate, known as first class, applicable to a shipment of bedding, and there was therefore no necessity for inquiry as to value. This first class rate was the rate paid by the shipper.

The published tariff of the petitioner as to household goods provided for three different rates, dependent upon

the value of the goods as declared by the shipper, each rate carrying a corresponding limitation of liability on the part of the carrier to the value as thus declared. These rates, as so provided in the tariff, were the first class rate referred to above, the second class rate, one and one-fourth times the first class rate, and the third class rate, one and one-half times the first class rate (Record p. 22). *The charges paid by the shipper were based upon the rate established for a declared and agreed value of the goods not to exceed ten cents per pound, and that rate carried with it a limitation of liability of the carrier to ten cents per pound.*

ERRORS TO BE REVIEWED.

The Trial Court charged the jury as follows, to which your petitioner duly excepted:

> "Now, if you find that the plaintiff did deliver one of these packages to the defendant company, and that at the time he in no manner misled the company, made no misrepresentation, actually told the defendant company through its agents just what that package contained, and he received a bill of lading for it, property was accepted upon the part of the railroad company, knowing what that package cotained, and it was lost or failure to deliver it (*sic*) then I say to you you should find for this plaintiff." (P. 31 Record).

> "Now as to the issue in this case, the first is to determine how and under what conditions were those goods delivered to the railroad company. If they had knowledge that it was household freight and accepted it and billed it in any other manner, then I say to you the defendant company is liable to this plaintiff if he imparted that knowledge to them and they had that knowledge." (P. 31 Record)

> "In the event that you should find for the plaintiff, you should assess his damages at whatever you find that value to be * * *." (P. 32 Record).

This view of the law was also taken by the Court of Appeals (P. 53 Record). It thus appears that the judgments of the State courts are made to rest upon the ground that the acceptance and billing of the shipment as bedding by the agent of the petitioner, when he knew that it was household goods, preclude the petitioner from limiting its liability. Your petitioner insists that the charge of the trial court was erroneous and that by reason thereof your petitioner was denied a right, title, privilege or immunity claimed under said Cummins Amendment.

ARGUMENT.

Respondent admits that in shipments of household goods the carrier is authorized to limit its liability and that if, in this case, the goods had been described in the bill of lading as household goods the liability of the petitioner would have been limited to the declared value.

The claim of the respondent (as embodied in the charge of the trial court and in the opinion of the Court of Appeals) is that since the agent of the petitioner knew that the shipment was household goods and notwithstanding described it as bedding, the shipment was subject to the terms of the bill of lading and to the tariff provisions applicable to shipments of bedding, and that such tariff provisions entitled respondent to recover the full value of the shipment. In other words, the claim is that the carrier is bound by a contract, the provisions of which, as applied to the facts of this case, are in violation of the Interstate Commerce Act and the applicable published tariffs, and it is so claimed for the

sole reason that the agent of the carrier had knowledge of such violation.

Your petitioner insists that since the shipment in question was in fact household goods, the tariff applicable to household goods must apply regardless of the acts or knowledge of the shipper or agent of the carrier and regardless of the contract made by them, and since the rate paid by respondent carried with it, as to household goods, a limitation of liability to ten cents per pound, based upon the declared value, the liability of the petitioner is limited to that amount. The tariff provisions embodied in the rate paid determine the whole liability of the carrier. *Atchison, T. & S. F. Ry. vs. Robinson,* 233 U. S. 173. *Western Union Telegraph Co. vs. Esteve Bros. & Co.,* 256 U. S. 566, 572.

The fact that the bill of lading under which the shipment moved described the shipment as bedding and contained a clause to the effect that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the time and place of shipment under its bill of lading, including freight charges if paid," does not determine the liability of the carrier. The contract between shipper and carrier does not necessarily control. The essential character of the movement determines the liability of the carrier. *B. & O. S. W. R. Co. vs. Settle,* 43 Sup. Ct. Reporter 28.

The fact that the agent knew that the shipment was household goods, but nevertheless described it as bedding, is immaterial. The knowledge or lack of knowledge of either the agent or the shipper, concerning either the facts surrounding the shipment or the terms of the tariff, in no way affects the application of the tariff. "The rights as defined by the tariff cannot

be varied or enlarged by either contract or tort of the carrier."

Keough vs. C. & N. W. R. R. Co., 43 Sup. Ct. Reporter 47;
Texas & Pac. R. R. Co. vs. Mugg, 202 U. S. 242;
Ks. Southern R. R. vs. Carl, 227 U. S. 639, 653;
Louisville & Nashville R. R. Co. vs. Maxwell, 237 U. S. 94, 98;
Georgia, Etc. R. R. vs. Blish Milling Co., 241 U. S. 190, 197;
Atchison, T. & S. F. R. R. Co. vs. Robinson, 233 U. S. 173;
N. Y. Central R. R. Co. vs. Goldberg, 250 U. S. 85.

In the *Goldberg* case, *supra*, no question of limitation of liability was involved. In that case there was an innocent misdescription of the articles shipped. The carrier contended that it was not liable in any amount because of this misdescription in the bill of lading, relying upon the decisions relating to limitation of liability where goods were shipped at a declared value and rate based upon such value. In deciding the *Goldberg* case, this Court was careful to point out that the cases relied upon to sustain the carrier's contentions were inapplicable because in the *Goldberg* case no valuation was placed upon the goods and no question of limitation of liability to a stipulated value was presented. The court very properly held, therefore, that since there was no provision in the tariff or in the bill of lading exempting the carrier or limiting its liability, the only effect of such misdescription of the character of the goods was merely to impose upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped. It did not affect the

liability of the carrier for failure to deliver the goods. If, in that case, the tariff rate applicable to the goods as actually shipped, had carried with it a limitation of liability to a declared value, any recovery by the shipper would have been limited to the value thus provided for.

In the instant case the applicable tariff rate did carry with it a specific limitation of liability. Any recovery by respondent, therefore, would necessarily be controlled by such limitations of liability as are prescribed by and inherent in the rates established by the published tariff.

It is claimed that because, when the shipment in question was delivered to the carrier, there was no value "declared in writing" or "agreed upon in writing" as provided by the Cummins' Amendment and the carrier's tariff, respondent is entitled to recover the full value of the shipment. The tariff is "in writing," and is an offer of a contract. When a shipper delivers property to a railroad at a certain point for transportation to a certain point, and pays a certain amount of freight money, the shipper's action is an acceptance of this tariff offer, the terms of the contract being determined by the property itself, points of shipment and distance and the rate paid, in connection with the tariff provisions applicable to such a situation. As tariff provisions are "in writing," no error of a railroad employe, particularly if known to the shipper, should be allowed to introduce any preference, discrimination or rebate into the transaction. The shipper is presumed to know the tariff provisions, and in this case he was getting a lower rate than he was entitled to, in view of his present claim as to the value of the household goods. Even if the railroad agent knew the property was household goods, he did not know it was worth more than ten cents per pound, and the ship-

per did. Neither the shipper nor the carrier can avoid tariff provisions by any failure, either knowingly or otherwise, to observe its requirements. The failure, to secure a declaration or agreement of value in writing would not excuse the shipper from the obligation to pay charges according to the character of the goods actually shipped; and if the rate applicable to the goods so actually shipped carried with it a limitation of liability, the shipper is bound by such limitation.

As was said by this Court in *Kansas City Southern Ry. vs. Carl,* 227 U. S. 639-652,

> "When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value."

In legal effect the respondent did agree to a value in writing of ten cents per pound, and he is estopped from asserting any higher valuation since he is chargeable with knowledge of the provisions of the tariffs and classifications then in effect. Respondent was conclusively presumed to know that shipment of household goods carried rates dependent upon the declared value thereof, and a corresponding limitation of liability. *Atchison etc. R. R. vs. Robinson, supra, C. & A. R. R. vs. Kirby,* 225 U. S. 155.

Therefore, in paying the first class rate, which as regards household goods carried with it a limitation of liability to ten cents per pound, respondent in law is taken to have made a declaration of value of 10 cents per pound, and cannot now be heard to assert a higher valuation. In *American Railway Express Co. vs. Lindenburg,* 260 U. S. 584, the contention was made that since the petitioner there did not take from the shipper a written declaration of value, or writ-

ten agreement as to value, signed by him, the respondent was entitled to recover the full value of the goods shipped. The form of receipt given by the petitioner in that case contained a stipulation that in consideration of the rate charged, which was dependent upon an agreed valuation, not exceeding fifty dollars for shipment of one hundred pounds, or less, and not exceeding fifty cents per pound for any shipment in excess of one hundred pounds, the shipper agreed, unless a greater value be declared at the time of shipment, that the company would not be liable in any event for more than that amount. The form of receipts which the express companies are authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he "accepts and signs this receipt," and a blank space is provided for his signature. It was contended that since the shipper had not signed this receipt that there was no written agreement or declaration of value, as required by the Cummins' Amendment. Answering this contention, this Court said:

> "Neither the statute nor the order of the Commission requires the signature of the shipper. * * * Naturally such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention. *Bills of Lading,* 52 I. C. C. Rep. 681, where it is said:
>
> 'It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading.' "

The fact that in that case the value was specified in the receipt is immaterial. In the instant case, respondent accepted the benefits of a lower rate dependent upon a limitation or agreement as to value as specified in the published tariff. The distinction is immaterial, since respondent must be taken to have assented to the terms of the tariff and was bound thereby. Respondent in this case accepted the bill of lading in which the box in question was described as bedding when he knew it was household goods. Having accepted the benefit of a lower rate dependent upon the specified valuation respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing.

This Court has repeatedly held that it was the purpose and intent of Congress, by the enactment of the various statutes regulating carriers, to definitely and permanently end the serious abuses arising from unfair discriminations and preferences, by establishing the published tariffs as the sole and absolute standard for determining the rights and liabilities of shippers and carriers in the transportation of property. And this Court has therefore steadfastly declined to permit any departure from this established standard, notwithstanding the many and ingenious devices and claims which have from time to time been urged as constituting grounds for exceptions thereto. This case is but another attempt to persuade this Court to modify this inflexible rule, and if successful would be but an entering wedge the effect of which would be to destroy this structure which Congress and this Court has so painstakingly constructed.

As is said by this Court in the *Lindenburg* case, *supra,* quoting from the case of *Kansas City Southern Ry. Co. supra,*

> "To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward under valuations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The trial court charged the jury that plaintiff might recover the full value of the goods if it found that the agent of the Erie Railroad Company had knowledge of the contents of the box, and this was the view of the Court of Appeals. We insist that this view of the law is manifestly erroneous.

For the reasons urged, therefore, we respectfully submit that judgment complained of should be reversed.

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No. 1018.

In the Supreme Court of the United States

OCTOBER TERM, 1922.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MARTIN KIRKENDALL,
Respondent.

BRIEF IN OPPOSITION TO PETITION for WRIT OF CERTIORARI.

E. P. CHAMBERLIN,
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

On the 18th day of September, 1920, respondent, Martin Kirkendall, delivered to the petitioner, The Erie Railroad Company, at Corning, New York, two boxes and one barrel for shipment to Cleveland, Ohio. Respondent told the freight agent at the time of shipment that one box contained two pillows, the barrel contained canned fruit and the other box contained miscellaneous household articles with a quilt and blanket around them. The freight agent then stated he would bill the box as bedding.

When respondent called for these packages at Cleveland, Ohio on or about the 24th day of September, 1920, the box which was described in the bill of lading as "one box of bedding," was missing, and was not delivered to him. It can be admitted that the freight agent should have billed the box as household articles instead of bedding.

Petitioner in their statement of the case, refer to this box as containing "*household furniture,*" though as a matter of fact, it contained miscellaneous household *articles,* and not a single piece of furniture.

An action was then instituted in the Municipal Court of Cleveland, Ohio, by respondent, to recover the value of the shipment which was lost in transit, the jury returning the verdict for plaintiff in the sum of Three Hundred Eighty-six Dollars and Ninety Cents ($386.90).

The contention of the petitioner is that there should have been a declared value or an agreed value of the goods at the time of shipment. The facts show that the respondent did not state the value of the property or that he was asked to do so; nor was there any provision in the bill of lading limiting the carrier's liability beyond the actual value of the goods. Petitioner states in page 11 of their brief, that the agent testified that respondent told him the box contained bedding. However, reference to the Record clearly shows that the agent did not remember accepting the shipment except from his shipping records.

The Railroad Company then instituted error proceedings in the Court of Appeals which affirmed the decision of the lower court. They then filed a motion in the Supreme Court of Ohio to have the Court of Appeals certify its record, which motion was denied.

ARGUMENT.

As set forth in the brief of Petitioner, it is the claim of the respondent that he is entitled to recover the actual value of the articles contained in the missing box if the freight agent, even though knowing their true contents, improperly or incorrectly accepted and billed the box under a wrong classification, especially since the bill of lading contains a provision that the Railroad Company was liable for the actual value of the property at the time and place of shipment and contained no statement limiting its liability.

The Railroad Company in this case have attempted to avoid liability for its own negligence and want of care. It was solely through the carelessness and negligence of their freight agent that this box was not shipped as "household articles." The Railroad Company in its petition for writ of certiorari, claim that the decision of the courts was against a right, title or immunity claimed by them. As a matter of fact, there is not a single decision or ruling of this Court or any other court supporting their contention, all of the decisions supporting the contention of this respondent. The Railroad Company in their brief, refer to the case of *The American Railway Express Company vs. Lindenberg* decided by this Court, January 8th, 1923, as being in point, but in that case *"the charges paid were on the basis of the limited liability set forth in the receipt."* As hereinbefore pointed out, no such statement was set forth in the bill of lading. In fact, the bill of lading expressly stated:

> *"The amount of any loss or damage for which any carrier is liable, shall be computed on the basis of the value of the property at the time and place of shipment under its bill of lading including freight charges if paid."*

The receipt or bill of lading in the *Express Company vs. Lindenberg,* further stipulated that in no event "shall this company be held liable or responsible nor shall any demands be made upon it beyond the sum of fifty dollars upon any shipment of one hundred pounds or less and for not exceeding fifty cents per pound upon any shipment weighing more than one hundred pounds and the liability of the Express Company is limited to the value above stated unless a just and true value is declared at the time of shipment and the declared value in excess of the value above specified is paid for or agreed to be paid for under this company's schedule of charges for excess value." No such provision or even similar provision appears in the bill of lading given to the shipper in this case, so clearly the *Express Company* case is not in point.

In the case of *The Union Pacific Railway Company vs. Burke,* decided by this Court February 28th, 1921, Mr. Justice Clarke pointed out that where the bill of lading contained among other conditions a statement that the carrier was liable for any loss or damage computed on the basis of the value of the property and where no lower value had been represented in writing or agreed upon, that the shipper had the right to rely on this clause as to the limit of liability of the carrier. This Court also points out in that case "this Court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common law liability by contract for exemption from the consequences of its own negligence or that of its servants."

Section 7884 of the Federal Code, relative to the regulations of the Interstate Commerce Commission. provides, among other things, *that it is the duty of all common carriers* to establish, observe and enforce just

and reasonable classification of property for transportation and of other matters relative to, and in connection with, receiving, handling, transporting and delivering property. It is not claimed that that would be the duty of a *shipper.*

It is also made the duty of the carrier to refuse to accept goods not properly packed nor properly classified, and it even provides a penalty on the *carrier* if this is not done, and where the carrier does accept goods improperly packed, it is liable for damage to the goods.

> "The carrying of goods manifestly not properly packed, the carrier must pay for damage, as it has failed to exercise its right to refuse to transport goods defectively packed."
>
> *Moore on Carriers,* page 559.

This same doctrine would be applicable to shipping goods not properly classified.

> "A carrier classifying goods received for shipment with knowledge of their character, and collecting the freight under such classification cannot avoid the contract or its liability for failure to ship according to the contract on the ground that the goods did not belong to the class named."
>
> *St. Louis Railway Company vs. The Cash Co.,* 161 Ala., 332;
>
> *Michie on Carriers,* Volume 1, page 427.

In this case, the shipper told the freight agent exactly what the missing box contained, and the law, as frequently decided by the courts, holds that where a shipper is guilty of no deception or negligence, or even where a misdescription was not intended to deceive, that the carrier is liable for the value of the goods lost.

> "Where the words 'contents unknown' are written above the signature to a bill of lading for

cases of domestics, one of which is not delivered, the shipper, on proving that the lost case contained silk goods and not domestics, may recover its value *where the misdescription was not intended to deceive* and it is not pretended that a knowledge of the true contents would have induced a higher freight or greater watchfulness."

Fasset vs. Ruark, 3 La. Ann., 694.

Also:

"Where a shipper of cigars not corded and sealed on which the freight rate was higher than on smoking tobacco, described by the shipper as 1 c/c tobacco, but was guilty of no fraud, deception or negligence which would have misled the carrier to accept the shipment at less freight than he was entitled to receive, he was entitled to recover for loss of the shipment, the value of the actual articles lost, with the freight paid."

Jenkins vs. Atlantic Coast Co., 66 S. E., 407; 84 S. C. 520.

It has been repeatedly held that even where a carrier misquotes a rate, the shipper suffering damage may recover full compensation. This would be true even though the tariffs as published were accessible to the shipper.

"The act of 1910, unchanged in 1920, provides a penalty against the carrier for giving a shipper the wrong rate. As the Statute in Section 8 gives a shipper the right to recover damages for any violation of the Act, it is believed that upon requesting a quotation of a rate as the Statute requires, *the shipper suffering damage in consequence of an erroneously stated rate, may recover damages in any court of competent jurisdiction.*"

Watkins on Shipper and Carrier, Volume 1, page 304 (1920).

The Railroad Company claim that if the box contained household goods, then the freight agent was under the law bound to refuse the shipment unless the value was declared. They claim that the knowledge of the agent as to the contents of the box is wholly immaterial. The Railroad Company in their brief filed in the Supreme Court of Ohio, go even further and state that their agent had no right and that it was *illegal* for him to accept the goods without a declaration of their value.

If the agent did anything illegal, can that be held to be an excuse on the part of the carrier to avoid liability? It may have been against the provisions of the Interstate Commerce Act for the Railroad Company's agent to accept and ship the box in question, *but the fact remains that the agent did accept and ship it under, what the Railroad Company claim was the wrong classification, though knowing its true contents.*

We admit that if respondent had declared the value of the goods at the time of shipment and they had been shipped under that rate, then he could not recover over that declared value. But no value of the goods was declared nor was respondent asked to do so.

> "The bailor is not bound to state the value of a package delivered to a carrier, unless inquiry is made."
>
> *Phillips vs. Earle,* 25 Mass. 182.

As herein before set forth even the bill of lading in this case provides that it is subject to the conditions written thereon, among which is the following:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under its bill of lading, including the freight charges if paid."
>
> *Petitioner's Exhibit "A."*

Petitioner herein cites a few cases as supporting their contention, which are undoubtedly the law, *but not one of which is in point here.* These citations, including *Georgia, etc., Railroad vs. Bliss Milling Company,* 241 U. S. 190; *Atkinson, etc., Railroad vs. Robinson,* 233 U. S. 173, and *C. & A. R. R. vs. Kirby,* 225 U. S. 155, hold that the freight rates as set forth in the Interstate Commerce Act are as binding upon the shipper as upon the carrier. This is correct.

All these cases are similar to the case of the *Pierce Company vs. The Wells Fargo Company,* 263, U. S. 278, (not cited by petitioner), wherein the shipper deliberately and purposely shipped four automobiles and accepted a receipt which showed on its face a limited liability in the total sum of fifty dollars. Naturally, it was held he could not recover beyond the liability shown in his receipt, but this case is no more in point than the others above mentioned. Most of the cases cited by petitioner have arisen over disputes of freight rates or from unjust discriminations to shippers in the matter of rates and refunds.

The charge of the trial court, Judge McMahon, pages 70 and 71, of the Record, is a fair and just statement of the law:

> "Now, if you find that the plaintiff did deliver one of these packages to the defendant Company and that at the time he in no manner misled the Company, made no misrepresentations, actually told the defendant Company through its Agent, just what the packages contained, and received a bill of lading for it, was accepted upon the part of the Railroad Company, knowing what that package contained, and it was lost or they failed to deliver it, then I say to you, you should find for this plaintiff."

We contend that where the shipper as in this case, with no thought in mind of securing a cheaper freight rate, but who honestly and fairly told the freight agent what the box contained, and even if the agent improperly and incorrectly shipped the box under the wrong classification, that the Railroad Company cannot avoid its liability for its own carelessness and negligence.

The finding of the Court of Appeals in affirming the judgment of the Municipal Court was clearly correct as to the law as applied to the evidence. Judge Vickery stated:

> "There is nothing in the record of this case to show any collusion or fraud was entered into between the agent of the Railroad Company and the shipper. There is some dispute in the record as to whether the shipper told the agent just what the box contained, but the Court submitted that question fairly to the jury under a charge that, if they had not communicated to him what it contained, he would not be entitled to recover. There is nothing in the record to show but what the Railroad Company classified this box of goods itself, and it is admitted that, according to the classification, they paid the regular freight on such classification. That it contained other things besides bedding, is clearly proven in this case, but we think from the whole record and from the verdict of the jury under a proper charge by the Court, whatever was in that box was there with the full knowledge of the Railroad Company through its agent, and there is no fraud, collusion or negligence charged in any way, and the proof shows that the goods were valued at least the amount of the verdict of the jury, and we do not see under the circumstances, why the plaintiff would not be entitled to recover under the bill of lading that is given in this case.

It must be remembered that the shipper was nowhere called upon to place a value upon these goods, and, under the circumstances of this case it seems to us he was entitled to recover the full value.

We do not deem it expedient to discuss the various questions that were raised by the brief of plaintiff in error, because we do not think they apply with much force to this case.

Taking the whole record together, we do not find any error which would warrant us to reverse the case and the judgment is, therefore, affirmed."

Ingersoll and Sullivan, J.J. concur.

Respondent respectfully contends that petitioner is not entitled to the writ of certiorari prayed for,

1st. Because if the goods were shipped under the wrong classification, it was solely through the carelessness and negligence of the petitioner's agent.

2nd. Because that in any event their bill of lading did not provide for limited liability but in fact expressly stated that the Railroad Company would be liable for the actual value of the goods at the time and place of shipment.

Respectfully submitted,

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